



# COMPANY LAW MEMO 2007

Newsletter Issue 6

August 2007

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Welcome to the *Company Law Memo 2007* newsletter, highlighting important recent developments in company and insolvency law. You can also access comprehensive updates to specific paragraphs via our online updating service. We always welcome suggestions from readers, so please contact us if you have any comments.

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#### **Disclaimer**

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## NEWS ROUND-UP

### Takeover Executive complaints procedure

See CLM: ¶6715

The Panel on Takeovers and Mergers added information on its complaints procedure to its website this month. Its Complaints Office will aim to deal with complaints about the Panel Executive within 10 business days. However, the Complaints Office will not deal with:

- » anything that should be referred to the Hearings Committee or the Takeover Appeal Board;
- » contractual or commercial disputes with the Panel;
- » complaints regarding the making of the Rules (which should be dealt with during consultation exercises), issuing practice statements or the publication of notes to advisers; or
- » complaints expressing general dissatisfaction with the Panel's policies.

The note can be found in "contact" section of the Panel's website:

<http://www.thetakeoverpanel.org.uk/new/>

### Consultation on a European Private Company Statute

See CLM: ¶3199/mp

The European Commission has issued a public consultation to determine whether it should proceed with its plans to introduce a European Private Company (EPC). The **purpose** of this corporate vehicle would be to make it easier for small and medium-sized companies to conduct cross-border business by having a type of company which can be set up in any Member State that would be governed by a single set of rules. Setting up an EPC statute was one of the measures set out in the Commission's "Action Plan on Company Law and Corporate Governance" (COM (2003) 284 final), but a feasibility study and public consultation conducted last year were met with mixed responses. Therefore, the Commission aims to get more detailed feedback on companies' concerns and ideas in this area.

The consultation asks for **responses on** two topics:

- » the obstacles (legal or otherwise) facing companies doing cross-border business in the EU by establishing subsidiaries or branches in other Member States; and
- » the content of an EPC statute.

The consultation sets out two possible **models for the EPC**:

- » one with multiple shareholders, which would require detailed rules regarding decision making and shareholders' protection; or
- » one with a single shareholder, which would require a simpler set of rules.

There are also two options for the **form of the EPC statute**:

- » a comprehensive and complete statute that sets out the rules on all of the important issues without reference to Member States' national law. The advantages of this approach are the achievement of uniformity and certainty in the rules. The foreseen disadvantages are that it would have to be a complex piece of legislation, there would be limited flexibility for EPCs to adapt the rules in their articles, and the influence of Member States' laws would be minimal (it was this last point that prevented such an approach succeeding for the Societas Europaea (or, SE. See ¶88+)); or
- » a more flexible statute that sets out the framework of the rules, with the details being left to companies' articles. Any gaps in the articles would be filled either by recourse to the general principles of the EPC statute, to EU company law in general or to the Member State's national law (alternatively, the statute could provide that any gaps in the rules should be filled by the Member State's law only). The advantages of this would be flexibility and the ability for a group in one Member State to have a similar set of rules. The disadvantages are that such an approach could lead to uncertainty, as well as not achieving the uniform set of rules (which is supposed to be the main purpose of the EPC).

The consultation is **available at**:

[http://ec.europa.eu/internal\\_market/company/epc/index\\_en.htm](http://ec.europa.eu/internal_market/company/epc/index_en.htm), and the **deadline** for responses is 31 October 2007. Depending on the responses, the Commission may then issue an impact assessment and a legislative proposal.

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# News



## RECENT CASES

### Unfair prejudice: offers to buy out a minority shareholder

See CLM: ¶124+

*Callard v Pringle and others* [2007] All ER (D) 91 (Aug)

This case demonstrates the importance of making an offer at a “fair value” to buy out the other party where a dispute arises. If the offer made is not a fair one, it will most likely be declined, which ultimately leads to a stalemate, increased legal costs and a drawn-out dispute that could take months rather than weeks to resolve.

Mr C was employed by ABC Ltd and owned one third of the company’s shares. On a weekly basis, ABC Ltd paid Mr C a sum of money comprising remuneration and dividends. Disputes arose between Mr C and the majority shareholders, to the extent that Mr C offered to buy them out. The majority shareholders rejected his offer, and made their own offer for Mr C’s shares. Mr C rejected their offer and later him and his wife (a director of ABC Ltd) were accused of stealing ABC Ltd’s funds and confidential information in order to set up a rival company. Despite denying these allegations, Mr C was suspended from work and Mrs C was removed from the company’s bank mandate.

Mr C applied to the court for relief from unfair prejudice (see ¶2105+). The court could not make a decision based upon the evidence available, so it ordered a stay for 8 weeks which would give both parties time to mediate. The court granted various injunctions to maintain the status quo during the stay.

The majority shareholders appealed on the basis that they had already made an offer to buy Mr C’s shares at a fair value, but that the offer had been rejected. Their appeal confirmed that the issue of whether an appropriate offer had previously been made was a serious one to be tried and so the case would proceed through the courts rather than mediation.

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### Jurisdiction in disqualification cases where the company has been dissolved

See CLM: ¶3045

*The Secretary of State for Trade and Industry v Arnold and Hopley* [2007] EWHC 1933 (Ch)

The court has clarified whether it has jurisdiction to hear a disqualification application where the company has already been dissolved following insolvency proceedings.

The secretary of state had applied for an order disqualifying a director on the ground of unfitness. The director’s company had been placed into administration and had then automatically dissolved (see ¶9154).

The legislation gives jurisdiction in disqualification proceedings “where... an administrator... has at any time been appointed in respect of the company in question, [to] any court which has jurisdiction to wind it up” (s 6(3)(c) CDDA 1986). In this phrase, “has jurisdiction” relates back to “has at any time been appointed” and so a court has jurisdiction in disqualification proceedings if it had jurisdiction to wind the company up at the date on which the administrator was appointed. This is also the case if a company is wound up compulsorily or voluntarily and where it is placed into administrative receivership.

This decision means that the expense of having to restore the company to the register can be avoided, as well as the risk of the restored company being managed by the persons the secretary of state is seeking to disqualify while the disqualification application is pending.

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## LEGISLATION

### Corporate Manslaughter and Corporate Homicide Act receives Royal Assent

See CLM: ¶2591, ¶7178

The Corporate Manslaughter and Corporate Homicide Act 2007 was rescued at the 11th hour when a compromise was finally agreed between the Commons and the Lords on the question of **death in custody**. The Act does include duties of care owed to persons in custody, but the part of the Act extending the duty that far will not come into force with the rest of the Act. It will instead be subject to the affirmative resolution procedure. This means that, whereas most of the Act will come into force on 6 April 2008 by means of an order of the secretary of state, the relevant subsection will only be brought into force if approved by resolutions of both the Commons and the Lords. This extension is expected to be made within 3 years.

The new Act abolishes the common law offence of gross negligence manslaughter so far as it applies to companies and other organisations within the Act. It replaces it with a statutory offence of corporate manslaughter (corporate homicide in Scotland). There are four **elements to the offence**:

1. **The company owes a relevant duty of care to the victim.** This reflects the position under the common law, so that a company owes the duty where it employs a person, where a person is on its land, where it supplies goods or services to a person, when constructing buildings etc, and when it carries out other activities on a commercial basis. There are various "public policy" exceptions to this, so that public authorities making policy decisions or carrying out policing and law enforcement activities, and the Ministry of Defence, the emergency, child-protection and probation services in carrying out their functions do not owe this duty. This is not a wholesale exemption under the Act (it does not exempt these bodies from their duties as employers or occupiers of premises), but it does include situations in which it would not be reasonable to hold the body liable for a person's death, such as administering emergency treatment to a patient or attempting to rescue a person from a burning building.
2. **The company breached that duty as a result of the way in which its activities were organised or managed** (the "management failure"). A substantial factor in the breach must be the conduct of the company's senior management (i.e. people who play a significant role in all or a substantial part of the company's activities).
3. **The management failure must have caused the victim's death.** It does not need to have been the only cause.
4. **The management failure must amount to a gross breach of the duty of care.** A breach is "gross" if it falls far below the standard that could have reasonably been expected. The Act sets out a number of factors for the jury to consider when reaching its decision.

A company found guilty of this offence will be **liable to** a fine. The court will also be able to order the company to alter any policies and practices that caused the victim's death, to prevent any similar incidents in the future. As a further deterrent to companies, the court will be able to require the company's conviction and punishment to be publicised.

The new Act will **come into force** on 6 April 2008, with the exception of the extension of the duty to persons in custody which is expected to come into force within 3 years.

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# Legislation



## DRAFT SECONDARY LEGISLATION UNDER CA 2006

BERR has recently published several draft statutory instruments under the new Companies Act. This issue's *Focus on...* summarises the content of those regulations and their relationship to the new Act.

Over the last few weeks, BERR has published various draft statutory instruments under CA 2006 covering a variety of topics. The Government has advised that further regulations will be published in the autumn.

Whilst BERR has already consulted on the policy content of the draft regulations (with the exception of the regulations concerning accounts), any further comments are requested by 30 September. BERR has published a report of the consultation on the accounts regulations on its website.

The drafts may be freely downloaded from the BERR website: <http://www.berr.gov.uk/bbf/co-act-2006/index.html>

### Unregistered Companies

The draft Companies (Unregistered Companies) Regulations 2008 (due to come into force on 1 October 2008) will revoke various provisions of the Companies Act 1985 and will adapt certain provisions contained within the Companies Act 2006 so that they will be applicable to unregistered companies.

An unregistered company is one which has been incorporated in the UK and has a principal place of business here, but that was not incorporated or registered under a public statute, was not formed to carry on a business (but was formed for the gain of itself or its members) and is not an open-ended investment company (s 1043 CA 2006).

#### Registration

An **unregistered company** may be able to register itself at Companies House if it:

- » existed before 2 November 1862 (including those registered under the Joint Stock Companies Acts); or
- » was formed after that date under legislation or letters patent or is otherwise constituted according to law.

The draft Non-Companies Acts Companies Authorised to Register Regulations 2008 will come into force on 1 October 2008. It will replace current provisions concerning the registration of a company which was not formed under the Companies Acts.

In order to register, a **non-Companies Acts company** will have to have the consent of a simple majority of its members present at a general meeting called to consider registration. However, if a company does not have limited liability and it wishes to register as a limited company, 75% of the members present will need to consent.

Before a non-Companies Act company is registered (with the exception of joint stock companies), it will have to send the following to Companies House:

- » a statement identifying the proposed name under which the company is to be registered;
- » a statement identifying where the registered office will be (i.e. England & Wales, Wales, Scotland or Northern Ireland);
- » a statement specifying the intended location of the registered office after registration;
- » the copy statute or other instrument constituting or regulating the company;
- » a list of all directors or managers of the company, specifying:
  - for an individual, his name, service address, usual residential address, occupation and date of birth; and
  - for a company or firm, the corporate or firm name and registered/principal office;
- » a statement confirming that the company wishes to be registered with the Welsh equivalent of 'limited' as part of its name, if this is the case; and
- » a statement confirming that the pre-registration requirements set out above have been complied with.

Upon successful registration, Companies House will send a certificate of incorporation to the company.

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### Consequences of registration

Upon registration, all property that belongs to or is vested in the non-Companies Act company will automatically pass to and vest in the registered company.

Any provisions contained within the legislation or other instrument constituting or regulating the company will continue to have effect as if they were contained in the company's articles of association. The draft new model articles of association will not apply unless the company chooses to adopt them by way of special resolution.

### Trading Disclosures

See CLM: ¶259, ¶585

Currently companies are required to publicise information about themselves on specified documents (see *Company Law Memo 2006 Newsletter Issue 8*). The draft Companies (Trading Disclosures) Regulations 2008 will extend these requirements when they come into force on 1 October 2008. The more information disclosed, the greater the benefit to the general public.

### Documents

The **company's name** will have to be displayed on all forms of documents and communications issued by it. It will have to be legible, i.e. in a reasonably sized font and easy to read colour and situated in a prominent place on the document.

On all business letters, order forms and websites, companies will also have to give the following **extra information**:

- » the part of the UK in which the company is registered;
- » the company's registered number;
- » the registered office address;
- » if the company is exempt from using the word "limited" as part of its name, the fact that it is a limited company; and
- » if the company is an investment company, the fact that it is an investment company.

### Building

Currently, all companies must display their registered **name** at their registered office. The draft regulations will extend this requirement to offices at which the company register is kept and at all other locations where the company carries on a business, with exceptions for domestic premises and companies which have been dormant since incorporation. The name will have to be displayed in a prominent place so it may be easily read by any visitor. If a company **shares an office** with six or more companies, the rule is relaxed. Each company will only be required to display its registered name so that it can be read for at least 20 continuous seconds every 4 minutes, for example by having it displayed on an electronic scrolling banner.

### Articles of association

See CLM: ¶435+, ¶9915, ¶9940

The government has issued an updated set of **draft new model articles** for companies incorporated on or after 1 October 2008. These are discussed together with related developments in *CA 2006: implementation*.

### Company records

See CLM: ¶3888+

Every company must make its own records available for **inspection** (s 1162(2) CA 2006). The draft Companies (Company Records and Fees) Regulations 2007 (due to come into force in stages on 6 April 2008 then 1 October 2008) will allow a company to keep these records in an office other than its registered office, so long as that place is situated in the same part of the UK as its registered office (i.e. England & Wales, Wales, Scotland or Northern Ireland).

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## DRAFT SECONDARY LEGISLATION UNDER CA 2006 cont...

Under the draft regulations, companies will have to **make their records available** for inspection for at least two hours between 9am and 5pm on each working day. A person wishing to inspect a private company's records will have to give prior notice. Generally, the notice period will be 10 working days. However, this will be shortened to 2 working days if notice is given within the notice period for a general meeting or the 28-day time frame for agreeing to a written resolution.

The records may be in electronic form or hard copy. Visitors will be allowed to make **copies** of the records while they are inspecting them. If a person asks the company to provide him with copies, the company will have to provide the copy in the format requested (i.e. electronic form or hard copy). However, if the records are only kept in hard copy, it will not have to provide an electronic copy to the person making the request. If a shareholder or debenture holder has already been provided with electronic copies of a record, the company is not obliged to also give him a hard copy of the same record.

### Fees

The draft Companies (Fees for Inspection and Copying of Company Records) Regulations 2007 will come into force on 1 October 2007. These regulations contain transitional fee levels for the copying and inspection of company documents from 1 October 2007 until these provisions are superseded by the provisions of the draft Companies (Company Records and Fees) Regulations 2007, as outlined below. For copies of other records such as directors' service contracts, resolutions and minutes of meetings, the fee will essentially be the same for both periods, but structured differently:

- » from 1 October 2007: 20p for every 1,000 words copied; and
- » from 1 October 2008: 10p for every 500 words copied, together with the reasonable costs incurred in delivery.

Register:	Directors	Secretaries	Members	Charges	Interests in Shares	Debenture Holders
Copy Fee	None specified	None specified	<b>01.10.07</b> 1 <sup>st</sup> 50: £3.50 Next 950: £31.50 Next 4,000: £20 Subsequent 5,000: £ 25	None specified	<b>01.10.07</b> 1 <sup>st</sup> 50: £3.50 Next 950: £31.50 Next 4,000: £20 Subsequent 5,000: £ 25	<b>Current</b> 1 <sup>st</sup> 100: £2.50 Next 1,000: 20 Subsequent £1,000: £15
			<b>01.10.08</b> 1 <sup>st</sup> 10: £1 Next 90: £10 Next 900: £20 Next 49,000: £40 Remainder: £40 Plus: reasonable costs of delivery		<b>01.10.08</b> 1 <sup>st</sup> 10: £1 Next 90: £10 Next 900: £20 Next 49,000: £40 Remainder: £40 Plus: reasonable costs of delivery	<b>06.04.08</b> 1 <sup>st</sup> 10: £1 Next 90: £10 Next 900: £20 Next 49,000: £40 Remainder: £40 Plus: reasonable costs of delivery
Inspection Fee	Current £2.50 per hour	Current £2.50 per hour	Current £2.50 per hour	5p per view	£2.50 per hour	Current £2.50 per hour
	01.10.08 £3.50 per hour	06.04.08 £3.50 per hour	01.10.08 £3.50 per hour			<b>06.04.08</b> £3.50 per hour

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### Residential addresses

See CLM: ¶3896, ¶3907

Company directors will benefit from greater **protection** under the draft Companies (Particulars of Usual Residential Address) Regulations 2008 (due to come into force on 1 October 2008) because their residential addresses will no longer be required to appear on the public register held by Companies House or in companies' registers. A director's residential address will become "protected information".

Directors and others whose addresses are on public record at Companies House will also be able to prevent their details being disclosed to the public where this puts them at risk.

### Restricted access to directors' addresses

In the interests of security, a group of **public authorities** (e.g. The Serious Fraud Office, The Office of Fair Trading) will have access to this protected information for the purposes of their investigations.

**Credit reference agencies** will only be able to access the protected information for vetting applications for credit and for carrying out money laundering checks.

### Risk of violence or intimidation

If there is a risk that a person will be subject to violence or intimidation as a result of the activities of a company (e.g. animal testing centres), he will be able to make an application to **prevent** an **address** from appearing on the public register. All applications will have to be supported by evidence supporting the person's belief that there is a serious risk that that he will be subjected to violence and intimidation

If an address is **already on the register**, an application will be able to be made to have the address removed, so long as the address was entered on or after 1 January 2003. The circumstances in which such an application may be made are where:

- » a director's residential address is already on the register;
- » a director ceased acting on or before 30 September 2008;
- » the company entered shareholders' addresses in an annual return or allotment of shares;
- » the company entered the addresses of subscribers in its memorandum of association; or
- » a secured lender registered a charge and its address has been recorded in the register.

In all cases, the applicant will have to have a genuine belief that there is a serious risk of him becoming subject to violence or intimidation as a result of the company's activities and he will have to provide evidence with his application to substantiate this belief.

Responses to the consultation supported giving Companies House the power to remove any addresses recorded on the register prior to 1 January 2003. The government will amend the draft regulations on this basis and has meanwhile confirmed that serving directors with current confidentiality orders will automatically be granted extra protection.

### Companies House

See CLM: ¶4040+

The following draft regulations have been published relating to the powers of the registrar of companies:

- » the draft Companies (Registrar of Companies) Regulations 2008; and
- » the draft Companies (Annual Return and Service Addresses) Regulations 2007.

From 1 October 2008, new requirements concerning the filing of documents will come into force and Companies House will have greater powers to amend or rectify entries on the register of Companies.

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### Amending the register

Companies House will be able to **annotate** the register if any material in it is misleading or confusing.

Companies House will also have the power to **rectify** the register by removing certain misleading or confusing information if it is forged, invalid or derived from an act committed without the authority of the company. The following details may be rectified:

- » a change in the company's registered office address;
- » the appointment or resignation of a director or secretary;
- » directors' residential addresses; and
- » addresses given for service.

Rectification will only be able to be made by way of application to Companies House. Only the person who initially lodged the information with Companies House or person or company affected by the information will be able to make this application. A 28-day window will be open for objections to be raised about the proposed rectification. If an objection is made, the register will not be rectified.

### Filing

Welsh companies will be able to **file in Welsh** the following documents without a certified English translation:

- » memorandum and articles of association;
- » resolutions/agreements affecting the company's constitution;
- » accounts and auditors' reports;
- » special resolutions re-registering the company as a different type of company (e.g. from public company to private limited company);
- » those relating to a reduction of capital; and
- » those changing the company's registered office to an address in Wales.

Overseas companies which have a presence in the UK will be able to **file documents in another language**, as long as they are accompanied by an English translation. However, the draft regulations restrict this to the memorandum and articles, court orders and valuation reports.

### Names and addresses

The draft legislation also specifies the roman **characters and symbols** that can appear in names and addresses in any documents filed at Companies House.

A **service address** is one to which documents may be physically delivered and where an acknowledgement of delivery may be received. Companies will not be able to give a post office box number or document exchange number as a service address on any document filed at Companies House.

### Annual return

See CLM: ¶14060+

The draft Companies (Annual Return and Service Addresses) Regulations 2007 will change the detail of the information to be inserted into a company's annual return. They are due to come into force on 1 October 2008.

Companies will still be permitted to keep their **records** at a place other than at their registered office. They will have to state where these records are kept on their annual return (for example, at a solicitors office or their own or their parent company's registered office).

If the annual return is **filed late**, both the company and all of its directors (including shadow directors) will be liable for a fine.

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### a. Shareholdings

The annual return will have to give the following information:

- » names of all shareholders of the company on the date to which the return is made up;
- » names of all those who ceased to be a shareholder of the company since the date on which the last return was made up; and
- » the number and class of any shares transferred since the date on which the last return was made up and the date of any such transfers, the number and class of any shares transferred since the date on which the last return was made up and the date of any such transfers.

### b. Directors (not including shadow directors)

The annual return will have to include the following information about each director:

- » name and former name;
- » service address (this may be the company's registered office address);
- » the country or state in which he is usually resident;
- » nationality;
- » business occupation; and
- » date of birth.

### c. Secretaries

Secretaries only need to disclose their full name and an address for service.

## Company accounts

See CLM: ¶4185 +

The government has published the following draft regulations relating to company accounts:

- » Small Companies and Groups (Accounts and Directors' Report) Regulations 2008;
- » Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008;
- » Companies Act 2006 (Accounts and Reports) (Amendment) Regulations 2008;
- » Companies (Summary Financial Statement) Regulations 2008; and
- » Companies (Revision of Defective Accounts and Reports) Regulations 2008.

All of these regulations are due to come into force on 6 April 2008 and will apply in relation to financial years beginning on or after that date.

### Small companies

The draft small company regulations set out the reporting requirements for:

- » individual Companies Act accounts for shareholders;
- » information on related undertakings (for small companies preparing either Companies Act or IAS accounts);
- » information on directors' benefits (for small companies preparing either Companies Act or IAS accounts);
- » Companies Act abbreviated accounts for Companies House;
- » the directors' report; and
- » small group accounts.

The draft essentially restates the 1985 Act requirements, but the Government hopes that the re-ordering of the provisions relevant to small companies will make compliance easier.

In response to the consultation, the Government has decided not to require small companies to disclose turnover in their abbreviated accounts.

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### Large and medium-sized companies

The draft large and medium-sized company regulations set out in separate schedules the reporting requirements for:

- » individual Companies Act accounts of “ordinary” (i.e. non-banking and insurance) companies;
- » individual Companies Act accounts of banking companies and insurance companies;
- » information on related undertakings (for companies preparing either Companies Act or IAS accounts);
- » information on directors’ benefits (for companies preparing either Companies Act or IAS accounts);
- » Companies Act group accounts;
- » the directors’ report; and
- » the directors’ remuneration report (for quoted companies).

The regulations list the exemptions available to medium-sized companies. In a change from the 1985 Act provisions, medium-sized companies will have to disclose their turnover in their abbreviated accounts.

Following consultation, the Government has retained the 1985 Act reporting requirements relating to the employment of disabled persons and in respect of employee involvement in company matters of concern to them.

Finally, the following technical amendments have been made to the provisions on consolidated accounts as a result of the UK GAAP/IFRS convergence programme:

- » the definitions of “identifiable assets”, “acquisition costs” and “adjusted capital and reserves” have been deleted;
- » the requirement to explain any significant adjustments in assets or liabilities (and any resulting adjustment to the consolidated reserves) when using the merger method of accounting has been removed; and
- » the requirements on how minority interests are reflected in the balance sheet and profit and loss accounts have been simplified.

### Thresholds

In determining whether a company is small or medium-sized, three factors are relevant: its turnover, balance sheet total and number of employees. If at least two out of three of these factors fall within the statutory limits, the company is small or medium-sized and qualifies for various exemptions. The draft Companies Act 2006 (Accounts and Reports) Amendment Regulations 2008 will amend the new Companies Act to increase the thresholds for turnover and balance sheet total (the thresholds for the relevant number of employees will remain the same). These regulations are due to come into force on 6 April 2008 and will apply in relation to financial years beginning on or after that date.

To qualify as a **small company**, a company will have to have an annual turnover of £6.5 million or less and/or a balance sheet total of £3.26 million or less (these thresholds are currently £5.6 million and £2.8 million respectively).

For a company to qualify as **medium-sized**, its annual turnover will not be able to be more than £25.9 million and/or its balance sheet total will not be able to be more than £12.9 million (these thresholds are currently £22.8 million and £11.4 million respectively).

The same figures will be used to judge whether or not a parent company qualifies as being small or medium-sized, however the figures quoted above will be the aggregate turnover and aggregate balance sheet total for the whole group.

### Late Filing

Companies incur **finer** if their accounts are filed late. The draft regulations propose to increase the levels of these fines to take account of inflation between 1992 and 2007. The table below summarises the current and proposed penalties. BERR has published consultative documents on the draft Companies (Late Filing Penalties) Regulations 2007 on its website and is inviting comments by 12 October 2007.

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How Late?	Private Company		Public Company	
	Current	Proposed	Current	Proposed
Up to 3 months	£100	£150	£500	£750
3-6 months	£250	£375	£1,000	£1,500
6-12 months	£500	£750	£2,000	£3,000
12+ months	£1,000	£1,500	£5,000	£7,500

Under the new Companies Act, private companies will be required to file their accounts 9 months after the end of their financial year, as opposed to 10 months under current legislation. The Government has recognised that companies will need time to adjust to the new deadline and that it would be unfair to impose the **higher penalties** so early on in the new regime. It is therefore proposed that the updated penalties will apply to all accounts delivered late on or after 1 February 2009 when the regulations come into force. This will then give companies a 10-month window within which to arrange filing in accordance with the new rules.

The regulations will also carry a “**repeat offender penalty**”, whereby the penalty will be doubled in the event that a company files its accounts late for 2 years in succession. It is proposed that this rule will only apply once a company has delivered 2 sets of accounts late under the new Companies Act. There will therefore be no penalty incurred in this respect until early 2011.

### Auditors

See CLM: ¶4295, ¶4301+, ¶4318

### Remuneration

The draft Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2007 will oblige companies to disclose the fees receivable by their auditors and their auditors' associates. These regulations will come into force on 6 April 2008.

For financial years beginning on or after 6 April 2008, **small and medium-sized companies** will have to disclose the level of fees paid to their auditors for auditing the accounts in a note to the annual accounts. They will also have to disclose any benefits in kind given to the auditors, together with the nature of the benefit and its estimated financial value. If the company has appointed more than one auditor within a financial year, it will have to make separate disclosures.

The secretary of state will have the discretion to require auditors of medium-sized companies to disclose limited information concerning the other fees paid to them.

As well as disclosing their fees and benefits in kind paid or given to their auditors for auditing their accounts, for financial years beginning on or after 6 April 2008 **large companies** will also have to disclose the level of remuneration receivable by the company's auditors in respect of their supply of services to the company over the previous financial year. Separate disclosure will be required for each type of the following service provided:

- » auditing accounts;
- » other services required by legislation;
- » services relating to IT;
- » internal audits;
- » valuation/actuarial services;
- » litigation;
- » recruitment and remuneration; and
- » corporate finance transactions.

If the company is part of a group, separate disclosure will be required in respect of services supplied to the company, its group companies and any associated pension schemes.

Consolidated **group accounts** may be prepared as if the undertakings included were a single company (with the exception of small and medium-sized companies). Consolidated group

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accounts will have to disclose the types of services specified and fees paid as if the group were a single entity. If this is done, the individual companies will not be required to make a disclosure; all they will need to do is to state that the group accounts disclose the auditors' remuneration.

### Liability limitation

The same draft regulations will require all companies to disclose the principal terms of any limitation of liability agreement it has entered into with its auditors, together with the date on which the resolution approving the agreement was passed (or alternatively, a resolution waiving the need for approval). This information will have to be disclosed in a note to the company's accounts for the relevant financial year.

### The Comptroller and Auditor General

After much consultation and debate, the Government has arrived at the conclusion that the Comptroller & Auditor General (C&A General) should be given authority under statute to audit all non-departmental public bodies.

Unfortunately, however, the C&A General cannot audit non-departmental public bodies which are companies. The EU Audit (8<sup>th</sup> Company Law) Directive requires all statutory auditors of companies to be **supervised by** a public body. Currently, the C&A General is not subject to such independent supervision.

An Auditor General is a body which is under a statutory duty to certify the accounts of all government departments and a variety of other public sector bodies. Under the new Companies Act, from 6 April 2008 Auditors General will be allowed to become statutory auditors and as a result they will be allowed to audit certain government bodies constituted as companies.

The draft Independent Supervisor Order 2007 (the date on which it will come into force is yet to be announced) will appoint The **Professional Oversight Board Limited (POB)** as an independent supervisor to review the performance of statutory auditors' duties. The POB is part of the UK's Financial Reporting Council that has overall responsibility for audit regulation within the UK.

The POB will be required under the regulations to produce an annual report, including an account of:

- » how the POB has discharged its supervision function;
- » the extent to which each auditor has complied with their duties;
- » any enforcement activity (including suspension notices and applications for compliance orders); and
- » activities carried out as a consequence of its status as a public authority.

Each year, the POB will have to prepare and publish a statement of its expenditure. The POB will not, however, be able to enter into a supervision arrangement without prior consultation with the Auditors General.

It is anticipated that the draft order will have little impact upon affected companies themselves, apart from having a change of auditor. The main burden of responsibility will fall upon the POB to develop its supervisory role.

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### Company charges

See CLM: ¶4636+

When a company charge is registered, certain information must be sent to Companies House. The draft Companies (Prescribed Particulars of Company Charges) Regulations 2007 will specify exactly what information will have to be sent to Companies House. They are due to come into force on 1 October 2008.

Companies will have to provide the following information to Companies House:

- » the date on which the charge was created;
- » a description of the instrument creating or evidencing the charge;
- » the amount secured by the charge;
- » the name and address of the chargee; and
- » a short description of the property charged.

If the company **acquires property** which is already subject to a charge, it must provide Companies House with all the information listed above, together with details of the date upon which it acquired the property in question.

Companies registered in **Scotland** will have to provide additional information when registering a floating charge.

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## COMPANIES ACT 2006: IMPLEMENTATION

The final **text** of the Companies Act 2006, explanatory **notes and tables** of destinations and origins are now freely available to download at: <http://www.opsi.gov.uk/acts/acts2006a.htm>

The Act received Royal Assent on 8 November 2006.

To see when specific sections of the Act will or have come into force, check the **implementation timetable** on the FL Memo Ltd newsletter homepage (follow the link to "Companies Act 2006 implementation timetable"). This document will be updated as new secondary legislation is passed and further announcements are made. The implementation timetable is now up to date to the Third Commencement Order.

### Third Commencement Order

The Companies Act 2006 (Commencement No. 3, Consequential Amendments, Transitional Provisions and Savings) Order 2007 (SI 2007/2194) received Royal Assent on 25 July.

This Third Commencement Order was discussed in *Issue 5*. It mainly deals with the provisions **coming into force on 1 October 2007** including parts relating to directors, derivative claims, resolutions and meetings and the business review. It also sets out various transitional provisions and consequential repeals and amendments.

The Order brings the following provisions into force on 15 December 2007 so far as necessary for the purposes of any regulations made before that date to implement the EC Directive on **cross-border mergers** (EC Directive 2005/56):

- » the registrar's requirements as to form, authentication and manner of delivery (s 1068);
- » hard copy and electronic form and related expressions (s 1168); and
- » the extension of Companies Acts to Northern Ireland (s 1284).

### Draft new model articles

BERR has published a **new set** of model articles in the draft Companies (Model Articles) Regulations 2007. This draft is open to consultation until 30 September, and the Government anticipates being able to finalise these regulations in the autumn this year. The draft new model articles *destination table* on the FL Memo Ltd newsletter homepage (follow the link to "Companies Act 2006 draft new model articles destination table") has been updated to reflect the changes made by the new draft, so that readers can update the references made to the original draft new model articles in *Company Law Memo 2007* that were applicable at the time of publication.

The new model articles under the Companies Act 2006 are expected to apply to companies incorporated on or after 1 October 2008. BERR has announced that, as a **transitional measure**, it intends to amend Table A (as well as Tables B to F) for companies incorporated on or after 1 October 2007 in order to take into account changes made by the implementation of many of the company management provisions in the new Act on that date. These transitional arrangements may be further updated in April 2008, when the third tranche of the new Act is due to come into force, and they will remain in place until the new model articles come into force in October 2008. At the time of writing, a draft of these transitional arrangements had not yet been published. Readers will be kept up to date with developments in future editions of *Company Law Memo 2007 Newsletter* and via the online updates.

### Political donations

See *CLM*: ¶3204

Two statutory instruments on the subject of political donations received Royal Assent in the second half of July: the Companies (Interest Rate for Unauthorised Political Donation or Expenditure) Regulations 2007 (SI 2007/2242) and the Companies (Political Expenditure Exemption) Order 2007 (SI 2007/2081). They will both come into force on 1 October 2007, to coincide with the implementation of the main parts of these provisions in the new Companies Act.

If a company makes a donation or incurs expenditure without the shareholders' authorisation, the directors will be liable to repay the sum spent, plus interest. The regulations set the interest rate at 8% per annum (SI 2007/2242). The order exempts political expenditure by newspapers and other publishing and media companies in the normal course of their business from the restrictions, so that they do not need authorisation from their shareholders to report the news (SI 2007/2081).

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